BEL REALTY SDN BHD

v.

KUMPULAN LANJUT BUDI (M) SDN BHD & ANOR

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL SUIT NO: 22-111-1998]
5 OCTOBER 2004

CONTRACT: *Estoppel - Plea of - Not specifically pleaded in defence - Evidence of estoppel raised by defendant at trial - No objection by plaintiff - Argument against estoppel raised during final submissions - Whether court could consider plea*

CONTRACT: *Estoppel - Plea of - Charge created and loan agreement executed by donee of plaintiff's power of attorney - Plaintiff ratified and confirmed actions of donee as its attorney - Plaintiff's directors voluntarily and truly executed loan agreement and deed of assignment with plaintiff's endorsement of consent - Plaintiff subsequently denying knowledge of the charge - Whether plaintiff should be estopped from denying knowledge of charge*

CONTRACT: *Non est factum - Plea of - Plaintiff's directors executed agreement and assignment freely and voluntarily on behalf of plaintiff - Whether plea ought to be considered*

The plaintiff was the registered owner of a piece of land ('the land'). It entered into a joint venture agreement ('JVA') with the first defendant to develop the land. Consequently, the plaintiff executed a power of attorney ('the PA') appointing the first defendant as its true and lawful attorney. The PA allowed the first defendant, *inter alia*, to charge or mortgage the land for purposes of obtaining a loan to finance development of the land. The plaintiff further ratified and confirmed the actions of the first defendant as its attorney. The first defendant thereafter applied and obtained a loan from the second defendant. Pursuant to the PA, the first defendant executed a third party charge on the land and loan agreement in favour of the second defendant. The first and second defendant later agreed to discharge the charge and substitute therefor a deed of assignment. Accordingly, the first and second defendants executed a deed of assignment with the plaintiff's consent endorsed thereon, as authorised under the company seal of the plaintiff in the presence of the

plaintiff's two directors who also affixed their signatures. The plaintiff subsequently denied execution of the charge and loan agreement in favour of the second defendant. The plaintiff alleged that the first defendant had not obtained the necessary approval for purposes of the housing development and that the loan purportedly given to the plaintiff was not for such a purpose. Judgment-in-default was obtained against the first defendant. Against the second defendant, the plaintiff sought to declare the charge null and void; an order to strike out the charge; and an order that the second defendant must discharge the charge and deliver the title to the plaintiff. The main issue that fell for determination before the High Court was whether the charge was created in favour of the second defendant with the plaintiff's authority or whether the charge was void. In his submissions the plaintiff's counsel argued that as the issues of ratification and estoppel had not been pleaded in the defence, such issues should not be considered by the High Court. The plaintiff further raised the plea of *non est factum*.

Held (dismissing the plaintiff's claim with costs):

[1] Evidence of estoppel had been adduced by the second defendant without any objection from the plaintiff, and both counsel had advanced their submissions. The court was therefore duty bound to consider the issue of estoppel based on the defence and the evidence. (p 41 e)

[2] It was clear that in the loan agreement the second defendant had made the plaintiff a party thereto, to which the plaintiff had agreed by way of the execution of the loan agreement by the plaintiff's two directors. There were also express provisions in the loan agreement relating to the charge created in favour of the second defendant. There could be no doubt that the plaintiff knew and had authorised the creation of the charge. Further cl. 10(a) of the PA expressly authorised the first defendant as donee to charge the land for obtaining a bridging loan to finance the development. (p 41 f-h)

[3] Since there was no dispute that the plaintiff's two directors had voluntarily and truly executed the loan agreement and the deed of assignment together with the plaintiff's endorsement of consent, which constituted ratification by the plaintiff, the plaintiff should be estopped from denying having knowledge of the charge. Further, the deed of assignment was executed to enable the first defendant to apply to the authorities for the surrender of the master title to the land and the re-alienation of individual titles, which

the plaintiff had, pursuant to cl. 4 of the deed, undertaken to deliver to the second defendant. Since the plaintiff, as donor, had ratified the first defendant's creation of the charge, the charge became the act of the principal. (pp 42 a-b & 43 e)

[4] The court could not uphold the plaintiff's submission that the JVA was a contingent contract which was unenforceable until the first defendant had obtained the approvals from the state authority. (p 44 b)

[5] The letter of offer was given by the second defendant to (and accepted) by the first defendant. The plaintiff was not a party thereto. There was thus no privity of contract between the plaintiff and the second defendant and therefore the plaintiff was in no position to rely on it to attribute any contractual or other obligation to the plaintiff. In any event, the plaintiff's two directors had executed the loan agreement and deed of assignment which expressly set out the rights and obligations of the parties, the determination of which had to depend on the true construction to be placed on these contractual documents which had superseded the letter of offer. The plaintiff was bound by the express provisions of the charge and the deed of assignment. (pp 45 g & 46 a-b)

[6] The plea of *non est factum* was untenable. The plaintiff's two directors had executed the loan agreement and deed of assignment freely and voluntarily on behalf of the plaintiff. The court had no hesitation in rejecting the plea on the basis of the principles enunciated in *Saunders v. Anglia Building Society*. (pp 47 d-h, 48 a-h & 49 a-h)

Case(s) referred to:

Ang Koon Kau & Anor v. Lau Piang Ngong [1984] 2 MLJ 277 ***(refd)***

Bank Bumiputra Malaysia Bhd v. Henry Ginai Langgie [1990] 1 MLJ 296 ***(refd)***

Boustead Trading [1985] Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 ***(foll)***

Chai Then Song v. Malayan United Finance Bhd [1993] 2 CLJ 640 HC ***(refd)***

Credit Lyonnais v. PT Barnard & Associates Ltd [1976] 1LLR 557 ***(refd)***

Goh Kim Hai Edward v. Pacific Can Investment Holdings Ltd [1996] 2 SLR 109 ***(refd)***

Kepong Prospecting Ltd & Ors v. Schmidt [1968] 1 MLJ 170 ***(foll)***

KEP Mohamed Ali v. KEP Mohamed Ismail [1981] 2 MLJ 10 ***(refd)***

Koh Yen Bee v. American International Assurance Co Ltd [2000] 3 CLJ 28 HC ***(refd)***

Magnum Finance Bhd. v. Ling Sing Ping [1988] 2 MLJ 304 ***(refd)***

National Land Finance Co-operative Society Ltd. v. Sharidal Sdn Bhd [1983] 2 MLJ 211 ***(refd)***

Oversea-Chinese Banking Corporation Ltd v. Philip Wee Kee Puan [1984] 2 MLJ 1 ***(refd)***

Puran Singh v. Kehar Singh & Anor [1939] MLJ 57 ***(refd)***
Powell v. Smith [1872] 14 Eq 85 ***(refd)***
Rosita Baharom (an infant) v. Sabedin Salleh [1993] 1 MLJ 393 ***(refd)***
Saunders (Executrix of the will of Rose Maud Gallie, deceased) v. Anglia Building Society [1971] AC 1004 ***(foll)***
Siti Aisha Ibrahim v. Goh Cheng Hwai [1982] 2 MLJ 124 ***(refd)***
SRMM Annamalai Chettiar v. Lassam Veeramanawi [1952] 18 MLJ 226 ***(refd)***
SRM Meyappa Chettiar v. Lim Lian Koo [1954] 20 MLJ 246 ***(refd)***
Suncorp Insurance and Finance v. Milano Assicurazioni SPA [1993] 2 Lloyd's Law Report 225 ***(refd)***
Superintendent of Lands and Surveys (4th div) & Anor v. Hamit Matusin & Ors [1994] 3 CLJ 567 SC ***(refd)***
United Dominions Trust Ltd v. Western BS Romanay [1976] 1 QB 513 ***(refd)***
WE Fitzmaurice v. John Bayley 6 EL & BL 867 (ER) ***(refd)***
Wilson & Another v. Tumman and Freston 6 Man & G 235 ***(refd)***
Wan Salimah Wan Jaafar v. Mahmood Omar (Anim Abdul Aziz, Intervener) [1998] 1 CLJ 480 HC ***(refd)***
Yeng Heng Enterprise Sdn Bhd v. Liow Su Fah [1979] 2 MLJ 240 FC ***(foll)***

Legislation referred to:
Contracts Act 1950, ss. 10(1), 33(a), 151, 190
Evidence Act 1950, s. 115
Rules of the High Court 1980, O. 18 rr. 7(1), 8(1)

Other source referred to:
Chitty on Contracts, 25th edn, p 751 para 752

For the plaintiff - Yau Jiok Hua; M/s Yau Jiok Hua & Co
For the 2nd defendant - SM Yoong (Juelle Oh); M/s Shook Lin & Bok

Reported by Andrew Christopher Simon

JUDGMENT

Low Hop Bing J:

Plaintiff's Claim
This is an action by the plaintiff against the second defendant for:

1. a declaration that the charge *vide* presentation No. 6490/97 Jilid 582 Folio 44 registered in the Registry of Titles Melaka ("the charge") in respect of the land held under Lot 270, Grant No. 15979, in Kawasan Bandar XXXVII in the district of Melaka Tengah ("the land") is null and void;

2. an order to strike out the charge;

3. an order that the first defendant and/or the second defendant discharge the charge and deliver the Discharge of Charge Form together with the duplicate charge and the original issue document of title to the plaintiff within 14 days of this order;

4. an order that, should the second defendant default and/or the first defendant decline to execute the Discharge of Charge Form, the Registrar of Titles be authorized to execute the same on behalf of the second defendant; and

5. costs.

Finding Of Facts

From the evidence adduced by the parties herein, I have arrived at the following finding of facts.

The plaintiff is the registered proprietor of the land while the second defendant is a financial institution and the registered chargee.

On 3 January 1997, the plaintiff and the first defendant entered into a joint venture agreement ("the JVA"), pursuant to which the plaintiff executed a power of attorney ("the PA") appointing the first defendant as its true and lawful attorney to do the things stated therein.

Cl. 10(a) of the PA expressly authorized the first defendant as donee:

> (10)(a) To charge or mortgage the Said Land or its subdivided lots or the Subdivided Individual Titles for whatsoever consideration our said Attorney shall in their absolute discretion think fit for obtaining a bridging loan to finance the development of the said Land into a housing estate and for that purpose to sign all necessary Memoranda of Charges and other documents and to accept or receive the loans and give valid receipts thereof.

The donee's authority is further confirmed and ratified in the following words:

> **And Generally** to do all acts and things and sign and execute all such documents as may be necessary for effectuating any of the purposes aforesaid as fully and completely as we, ourselves could do if personally present.
>
> And the Donor hereby agree to ratify and confirm all and whatsoever our said Attorney shall lawfully do in the premises by virtue of these presents.

By an application, the first defendant applied and obtained from the second defendant a loan of RM1.8 million ("the loan").

On 30 July 1997, the second defendant issued a letter of offer to the first defendant ("the letter of offer") which the first defendant accepted on the same day.

Acting under the PA, on 5 August 1997, the first defendant executed the charge and a loan agreement ("the loan agreement") by way of security. The charge is a third party charge.

On 6 August 1997, the second defendant disbursed the loan to the first defendant.

On 8 August 1997, the first defendant applied to the second defendant for, and on 28 August 1997 the second defendant agreed to, a discharge of the charge and to substitute therefor a deed of assignment, for the purpose of the surrender and realienation of the land to the state authority for the purpose of housing development under the JVA.

On 29 August 1997, the first and the second defendants executed a deed of assignment with the plaintiff's consent endorsed thereon, as authorized under the company seal of the plaintiff in the presence of the plaintiff's two directors who have affixed their signatures and the consent has been noted in the plaintiff's records.

The plaintiff denied execution of the charge and the loan agreement in favour of the second defendant (para. 10 of the statement of claim).

The plaintiff alleged that the first defendant has not obtained the necessary approval for the purpose of housing development and that the loan purportedly given to the plaintiff was not for such purpose.

The plaintiff has obtained judgment in default against the first defendant which has since been wound up.

The plaintiff has now proceeded with the trial against the second defendant.

Agreed Issues For Determination

Parties have agreed that the issues for determination by the court are:

> Whether the charge was created in favour of the second defendant with the authority of the plaintiff and whether it was void?

Submissions By Counsel And Decision Of The Court

Ratification And Estoppel

Mr. Yau Jiok Hua, learned counsel for the plaintiff, submitted that the issue of ratification and estoppel had not been pleaded in the defence and should

not be considered by the court. He explained that when a loan is to be secured by a third party charge over the land created by the donee of the PA given pursuant to the JVA, the chargee is under a duty to observe the terms of the JVA in respect of the authority to create the charge, relying on *Magnum Finance Bhd. v. Ling Sing Ping* [1988] 2 MLJ 304; and *Bank Bumiputra Malaysia Bhd v. Henry Ginai Anak Langgie* [1990] 1 MLJ 296.

He added that the limits of the first defendant's authority has been set by cl. 17 of the JVA for the purpose of obtaining a bridging loan to finance the housing development, and that the JVA is a contingent contract, conditional upon the developer obtaining the approvals for such development. As these approvals had not been obtained, the JVA is unenforceable by either party, invoking s. 33 of the Contracts Act 1950; and *National Land Finance Co-operative Society Ltd. v. Sharidal Sdn. Bhd.* [1983] 2 MLJ 211.

Miss Yoong Sin Min, assisted by Miss Juelle Oh, contended that the second defendant's defence, para. 12 had pleaded that at all time the plaintiff knew and authorized the creation of the charge. They added that in the light of *Boustead Trading [1985] Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.* [1995] 3 MLJ 331 FC, estoppel need not be pleaded.

They said that it is now too late to object as there was no objection by the plaintiff to the evidence led for the second defendant, seeking support in *Superintendent of Lands and Surveys (4th div.) & Anor. v. Hamit bin Matusin & Ors.* [1994] 3 MLJ 185 SC; *Rosita bte Baharom (an infant) v. Sabedin bin Salleh* [1993] 1 MLJ 393 SC; A*ng Koon Kau & Anor. v. Lau Piang Ngong* [1984] 2 MLJ 277 FC; *Siti Aisha binti Ibrahim v. Goh Cheng Hwai* [1982] 2 MLJ 124 FC; *Oversea-Chinese Banking Corporation Ltd. v. Philip Wee Kee Puan* [1984] 2 MLJ 1 PC; *K.E.P. Mohamed Ali v. K.E.P. Mohamed Ismail* [1981] 2 MLJ 10 FC; *Wilson and another v. Tumman and Freston 6 Man & G 235 ER; S. RM. Meyappa Chettiar v. Lim Lian Koo* [1954] 20 MLJ 246; *Koh Yen Bee v American International Assurance Co. Ltd.* [2000] 7 MLJ 278; *W.E. Fitzmaurice v John Bayley 6 EL & BL 867 (ER); Powell v. Smith* [1872] 14 Eq. 85; *S.R.M.M. Annamalai Chettiar v. Lassam Binti Veeramanawi* [1952] 18 MLJ 226; *Goh Kim Hai Edward v. Pacific Can Investment Holdings Ltd.* [1996] 2 SLR 109; *Suncorp Insurance and Finance v. Milano Assicurazioni SPA* [1993] 2 Lloyd's Law Report 225; s. 190 Contracts Act 1950 and s. 115 of the Evidence Act 1950.

As regards the plaintiff's contention relating to unpleaded estoppel, I am of the view that the answer is to be found in *Boustead Trading, supra*, where the Federal Court through the judgment of Gopal Sri Ram JCA, after considering the rules of pleading contained in O. 18 r. 7(1) and r. 8(1) of the Rules of the High Court 1980, recognized that:

(1) estoppel is a matter which requires to be pleaded;

(2) these rules are sufficiently met if the material facts giving rise to the estoppel are sufficiently pleaded without actually using the term "estoppel": (at p. 341 c to g);

(3) even where a party has failed to set out the material facts in his pleading but has occasioned no surprise to his opponent, a court may, in the interest of justice, permit the point to be taken: (at p. 341 i);

(4) where there is no pleaded case of estoppel, but there is let in, without any objection, a body of evidence to support the plea, and argument is directed upon that point, it is the bounden duty of a court to consider the evidence and the submissions and come to a decision on the issue. It is no answer, in such circumstances, to say that the point was not pleaded: (at p. 342 b to c).

Similar circumstances prevail here as evidence of estoppel had been adduced by the second defendant without any objection by the plaintiff and the respective learned counsel herein have advanced their submissions. It is therefore my bounden duty to consider the issue of estoppel based on the defence and the evidence adduced. (See also *Superintendent of Lands, supra; Rosita bte Baharom, supra; Ang Koon Yau, supra; Oversea-Chinese Banking Corporation, supra.*)

Upon a proper perusal of the second defendant's defence, it is evident to me that para. 12 thereof avers that in the loan agreement, the second defendant has made the plaintiff a party thereto by requiring the plaintiff to comply with the terms and conditions thereof, to which the plaintiff has agreed by way of the execution of the loan agreement by the plaintiff's two directors. There are express provisions in the loan agreement relating to the charge created in favour of the second defendant. There can be no doubt that the plaintiff knew and had authorized the creation of the charge.

Further, cl. 10(a) of the PA has expressly authorized the first defendant as donee to charge the land for obtaining a bridging loan to finance the development.

Since there is no dispute that the plaintiff's two directors had voluntarily and truly executed the loan agreement and the deed of assignment together with the plaintiff's endorsement of consent, which constitutes ratification by the plaintiff, I am of the view that the plaintiff is obviously estopped from denying having knowledge of the charge. Further, the deed of assignment was executed to enable the first defendant to apply to the authorities for the surrender of the master title to the land and realienation of individual titles, which the plaintiff had pursuant to cl. 4 thereof given an undertaking to deliver to the second defendant. The preamble to the deed of assignment has clearly set out the circumstances in which the loan was obtained, viz by way of the charge, the PA and the JVA.

The doctrine of ratification has found expression in *Wilson and another, supra,* where Tindal CJ held, inter alia, that "an act done, for another, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him ... . In that case, the principal is bound by the act ... to the same extent as by ... the same act done by his previous authority.

Within our shores, the above dictum has been applied by Mathew CJ in delivering judgment of our Court of Appeal in *S RM Meyappa Chettiar, supra* at p. 247; and Abdul Malik Ishak J in *Koh Yen Bee, supra*, at p. 292 c - d.

Further illustrations are to be found, where a principal supported his agent in what was done on the principal's behalf, as in *WE Fitzmaurice, supra*, where the House of Lords at p. 1090, in a majority judgment (Crompton J dissenting) held that the principal was bound by the agreement on ground of ratification.

In Powell, supra, the lessor's agent executed a lease agreement, after which the lessor went into possession of the property with full knowledge of the agreement which was not disputed. Lord Romilly MR held, inter alia, that the lessor had thereby ratified the agent's act.

Where an agent pursuant to a power of attorney executed three charges on behalf of the donor plaintiff who had at the material time taken no action to repudiate the agent's authority, as in *S.R.M.M. Annamalai Chettiar, supra,* Buhagiar J held at p. 229 that the donor plaintiff's conduct amounted to ratification. (See also the judgment of Judith Prakash J of the Singapore High Court in *Goh Kim Hai, supra,* at p. 134; and Waller J in *Suncorp Insurance, supra,* at p. 234.)

The plaintiff's ratification by way of the execution of the loan agreement and the deed of assignment, and estoppal from denying its authority to the creation of the charge, is further accentuated by s. 190 of the Contracts Act 1950 which reads:

> Section 190 Liability of principal inducing belief that agent's unauthorized acts were authorized.
>
> When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by those acts or obligations if he has by his words or conduct induced such third persons to believe that those acts and obligations are within the scope of the agent's authority.

And also s.115 of the Evidence Act 1950 in the following words:

> **Estoppel**
>
> When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.

(See also *Boustead Trading, supra,* FC at pp. 159-161, per Gopal Sri Ram JCA; and *Koh Yen Bee, supra*, at p. 291 per Abdul Malik Ishak J)

In the light of my finding that the plaintiff as the donor of the PA has ratified the first defendant's ie, the donee's creation of the charge, the charge becomes the act of the principal.

In *Magnum Finance, supra,* cited for the plaintiff, the defendant in the foreclosure proceedings alleged that the charge was created by its attorney without his knowledge and in excess of the attorney's authority for purposes not connected to the joint venture agreement. The defendant on the other hand has filed a civil suit against, *inter alia*, the plaintiff alleging similar issues. Siti Norma Yaakob J (now FCJ) ordered a stay of the foreclosure proceedings pending the determination of the civil suit.

Similar foreclosure proceedings arose in *Bank Bumiputra, supra,* where the defendant, the registered landowner had granted a power of attorney to his brother who had charged the land to the plaintiff to obtain banking facilities, which were for the attorney's own benefit, as a result of which Haidar, J (now CJ(M)) dismissed the originating summons.

It is to be noted that the facts in *Bank Bumiputra, supra,* were at variance with those before me, as the plaintiff herein had hoped that the first defendant would get the loan and consequently, payment would be made to the plaintiff.

In the circumstances, I hold that the authorities cited for the plaintiff were not supportive of the plaintiff's contention.

Contingent Contract

I am unable to uphold the plaintiff's submission that the JVA is a contingent contract and unenforceable until the first defendant has obtained approvals from the state authority.

Section 10(1) of the Contracts Act 1950 expressly provides that all agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Section 33(a) of the Contracts Act 1950 governing contingent contracts was considered by the Federal Court through the judgment of Suffian LP (as he then was) in Halimah, supra, where a sale of land subject to obtaining the title from the state was held to be a conditional sale and that the contract was enforceable.

In *Jaafar bin Ibrahim, supra*, Peh Swee Chin J (later FCJ) in the first instance court and, on appeal, the then Supreme Court drew a distinction between a promisory condition which is a promise or assurance for the non-performance of which a right of action accrues to the innocent party, and a contingent condition, a non fulfilment of which gives no right of action for breach, but simply suspends the obligations of one or both parties: per Mohamed Azmi SCJ at p. 29 d-e rt; and *Chitty on Contracts*, 25th edn. p. 751 para 752.

In *National Land Finance, supra*, the principal issue was whether a sale and purchase agreement of a certain property was void or still subsisting, or alternatively, if the agreement did not become void, whether the vendor was discharged from further performance thereof because of the failure by the purchaser to pay the balance of the purchase price within the stipulated time, therefore entitling the vendor to forfeit the deposit paid thereunder. Wan Hamzah J (later SCJ) and on appeal the Supreme Court in a judgment delivered by Salleh Abas CJ(M) (later LP) held both the principal and the subsidiary issues in favour of the vendor ie, the agreement was aborted.

It is to be noted that the action in *National Land Finance, supra*, was litigated between the parties to the sale and purchase agreement, and did not concern the matrix of factual circumstances which prevail in the instant action. Hence, I am unable to see how that authority can be of any assistance to the plaintiff herein.

Letter Of Offer And JVA

It was contended for the plaintiff that the second defendant has contravened paras. 8, 9 and 11 of its letter of offer to the first defendant, in that the first drawdown of the loan should not have been allowed as there was no approval from the relevant authority for the layout plan including the payment of premium; and that the purpose and disbursement of the loan was not only outside the scope of cl.17 of the JVA, but also untrue.

Another stand taken for the plaintiff was that as at the date of the letter ie, 30 July 1997, the time for payment of the advance of the plaintiff's entitlement under cl. 6 of the JVA had lapsed and that the JVA was aborted due to the default, omission or neglect of the landowner to obtain the approvals stated in cl. 5.

It was submitted for the second defendant that the letter of offer was not intended for the plaintiff, and so the second defendant owed no contractual or other obligation to the plaintiff, citing *Kepong Prospecting Ltd & Ors. v. Schmidt* [1968] 1 MLJ 170; and *Yeng Heng Enterprise Sdn. Bhd. v. Liow Su Fah* [1979] 2 MLJ 240 FC.

It was also argued for the second defendant that the second defendant was not a party to the JVA; and that the PA had given the first defendant the power to execute the loan agreement and the charge.

It is my specific finding that the letter of offer was given by the second defendant to and accepted by the first defendant and that the plaintiff was not a party thereto, in which case there is no privity of contract between the plaintiff and the second defendant and so the plaintiff is in no position to rely on it in order to attribute any contractual or other obligation to the plaintiff: see *Yeng Hing Enterprise Sdn Bhd*, FC, *supra,* at p. 242 g-h left per Abdoolcader J (later SCJ).

In *Kepong Prospecting*, *supra*, the Privy Council held, inter alia, that an agreement is not enforceable by a person who was not a party to it in his personal capacity.

In any event, the letter of offer has now taken a back seat as the plaintiff's two directors have executed the loan agreement and deed of assignment which expressly set out the rights and obligations of the parties thereto, the determination of which must depend on the true construction to be placed on these contractual documents which have superseded the letter of offer.

I am of the view that the plaintiff is bound by the express provisions of the charge and the deed of assignment which form part of the agreed bundle of documents, which I must give due consideration. This is in line with the advice of the *Privy Council in Oversea-Chinese Banking Corporation, supra,* delivered by Lord Bridge of Harwich at p. 3 b-c rt to the effect, *inter alia,* that where a document eg, a letter has been received in evidence, it became part of the total material on which the judge had to decide the case.

Regarding the JVA, there can be no doubt that the parties thereto were the plaintiff and the first defendant. The second defendant being a non-party thereto is not bound by the terms.

However, for purposes of completeness, I shall consider cl.17 thereof which reads as follows:

> **17. Bridging Finance**
>
> In the event the Developer shall desire to obtain a bridging loan to finance development works on the Said Land the Landowner shall and hereby agree to charge the Said Land and or all the subdivided titles to such Bank or Financial Institution (hereinafter called "The Bank") as security for bridging loan to be granted by the Bank to the Developer Provided That in such event the Developer shall and hereby covenants:
>
> a) to pay and service all interest, costs, charges instalments and redemption sums due to the Bank
>
> b) to utilize the said loan solely for purposes of construction and development of the Said Land into a housing estate.

It is clear to me that under cl. 17, the first defendant as landowner has agreed to charge the land as security for the first defendant to obtain a bridging loan solely for the purposes of housing development. I accept DW2's evidence that the bridging loan constituted the working capital for the housing development. I also specifically find that the RM1.8 million is the bridging loan for the purposes of cl. 10(a) of the PA and cl. 17 of the JVA and that the creation of the charge is consistent with the express provisions of the PA and JVA.

Non-est factum

The plaintiff insisted that it is a non-party to the loan agreement and that the consideration for the deed of assignment had failed in which case the charge is unenforceable and void, as it was obtained by an insufficient or void instrument. Support was sought in, *inter ali*a, *Puran Singh v. Kehar Singh & Anor.* [1939] MLJ 57. The plaintiff is in effect relying on the plea of non est factum.

The second defendant's response is that the plaintiff's plea of non est factum is untenable, relying on the authorities of *Saunders (Executrix of the will of Rose Maud Gallie, deceased) v. Anglia Building Society* [1971] AC 1004; *Credit Lyonnais v. P.T. Barnard & Associates Ltd.* [1976] 1LLR 557; *United Dominions Trust Ltd. v Western B.S. Romanay* [1976] 1 QB 513; *Chai Then Song v. Malayan United Finance Bhd.* [1993] 2 CLJ 430; and *Wan Salimah bte Wan Jaafar v Mahmood bin Omar* (Anim bte Abdul Aziz, Intervener [1998] 5 MLJ 162.

After considering *Puran Singh, supra*, I am of the view that the judgments of Thomas CJ in the Court of Appeal at p. 61 rt column c, Cussen J at p. 63 left column c; and Aitken J. at p. 64 left column c-d, had made it explicit that the subject matter concerned an invalid power of attorney.

The parties before me have never disputed the validity of the PA. Hence, it is impossible to see how the Court of Appeal decision in Puran Singh, supra, can be of any assistance to the plaintiff.

In my judgment, it is to be observed that the plaintiff's two directors have executed the loan agreement and deed of assignment freely and voluntarily on behalf of the plaintiff. One director, PW1 testified in Chinese but there is no evidence that he was illiterate in the English language. The other signatory is the Head of Department of the Estate and Facilities Department in the Tunku Abdul Rahman University. His command and standard of English as demonstrated in his evidence is in my view impeccable.

This leads me to the question as to whether the plaintiff can successfully maintain the plea of *"non est factum*" or "it is not his deed" ("the plea")? For this purpose, it is necessary to examine the principles which have been judicially expounded.

The modern starting point may be found in the landmark decision of the House of Lords in Saunders, supra. There, Gallie, a 78-year old lady who had broken her spectacles and could not read, was asked to sign a document which she

a was told was a deed of gift of a house to her nephew, when it was an assignment of the house by her to one Lee for £3000 which however was never paid to her. Lee then mortgaged the house for £2000 to a building society. On Lee's default, the building society sought to obtain possession of the house. Gallie on the basis of *non est factum* began an action against Lee. b The House of Lords held that Gallie had not established the plea as Gallie having signed what was obviously a legal document on which money was advanced on the faith of it being her document, could not disavow her signature.

The following principles have been enunciated:

c

(1) There is a heavy burden of proof on the person who seeks to invoke this plea ie, to prove all the circumstances necessary to justify its being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances;

d

(2) The plea could not be available to anyone:

(a) who signed without taking the trouble to find out at least the general effect of the document; or

(b) whose mistake was really a mistake as to the legal effect of the e document;

(3) There must be a radical or fundamental difference between what he signed and what he thought he was signing (per Lord Reid at pp. 1016 and 1017 b-e);

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(4) The difference must be in a particular which goes to the substance of the whole consideration or to the root of the matter and that the burden of proving the plea is on the party disowning his signature and not on the opposite party (per Lord Hodson at pp. 1018 h to 1019 a and per Lord Wilberforce at p. 1027 c);

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(5) The difference must be such that the document signed is entirely or fundamentally different from that which it was thought to be, so that it was never the signer's intention to execute the document, and that the plea cannot succeed if the signer had been careless: (per Lord Dilhorne h at p. 1022 g-h and at p. 1023 a);

(6) A document should be held void only when the element of consent is totally lacking ie, when the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended;

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(7) A man cannot escape from the consequences, as regards innocent third parties, of signing a document if, being a man of ordinary education and competence, he chooses to sign it without informing himself of its purport and effect: (per Lord Wilberforce at p. 1026 a-b and e); and

(8) The plea should be confined within narrow limits and that it rightly prevented the plea from being successful in the normal case of a man who, however much he may have been misinformed about the nature of a deed or document, could easily have ascertained its true nature of reading it and has taken upon himself the risk of not reading it: (per Lord Pearson at p. 1034 a).

The plea was also rejected when the above judgment was applied by:

(1) Mocatta J in *Credit Lyonnais, supra*, where the defendants' managing director one B. had signed the bills of exchange in the French language of which B was completely ignorant, as the defendants had not discharged the burden of proving that B had acted carefully;

(2) the Court of Appeal in *United Dominions Trust, supra*, where a person who executed a blank hire purchase agreement as he had also not discharged the onus that he had acted carefully;

(3) James Foong, J in *Chai Then Song, supra*, where a guarantor signed a deed of guarantee with the relevant particulars left blank but subsequently filled in;

(4) Abdul Malik Ishak, J in *Wan Salimah, supra*, where the plaintiff entered into a written agreement with the defendant for a lease of plaintiff's three pieces of land, although he was unable to read and write Bahasa Malaysia and the agreement has not been explained to him.

Reverting to the finding of facts as alluded to above, I have no hesitation in rejecting the plea on the basis of the principles enunciated in *Saunders*, *supra*, as I am unable to find any plausible evidence to support the plaintiff's plea.

Conclusion

On the foregoing grounds, I hold that the charge was created in favour of the second defendant with the authority of the plaintiff and that it is valid. Hence, the plaintiff's claim herein is devoid of merits. I dismiss it with costs.